Lauren Manufacturing Company *and* United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO-CLC, Local No. 1091. Case 8-CA-16622

21 June 1984

DECISION AND ORDER

BY MEMBERS ZIMMERMAN, HUNTER, AND DENNIS

Upon unfair labor practice charges filed 24 March 1983 by the Union, United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO-CLC, Local No. 1091, the General Counsel of the National Labor Relations Board issued on 6 May 1983 a complaint against the Respondent, Lauren Manufacturing Company, alleging that it has violated Section 8(a)(5) and (1) of the National Labor Relations Act. The Respondent filed an answer denying the commission of any unfair labor practices and asserting certain affirmative defenses.

On 26 October and 3 November 1983 the parties jointly moved to transfer the instant proceeding to the Board without benefit of a hearing before an administrative law judge and submitted a proposed record consisting of the formal papers and the parties' stipulation of facts with attached exhibits. On 23 February 1984 the Board issued an order granting the motion, approving the stipulation, and transferring the proceeding to the Board. The General Counsel and the Respondent filed briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in the case, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is an Ohio corporation engaged in the manufacture of extended rubber products at its facility located in New Philadelphia, Ohio. The Respondent, in the course and conduct of its business operations, annually sells and ships goods and material valued in excess of $50,000 directly to points and places outside the State of Ohio. Accordingly, we find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO-CLC, Local No. 1091 is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *Issue*

The issue presented is whether the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing the terms of its employee medical insurance plan without bargaining with the Union.

B. *Facts*

On 7 July 1981, pursuant to a representation election, the Union was certified as the exclusive collective-bargaining representative of the Respondent's employees in the following unit:

> All production and maintenance employees, including regular part-time employees, line operators and quality control inspectors employed by the Employer at its facility located at 2228 Reiser Avenue, S.E., New Philadelphia, Ohio, but excluding the scheduler, all office clerical employees, and professional employees, guards and supervisors as defined in the Act.

Contending that the certified unit was inappropriate, the Respondent refused the Union's request to bargain collectively and to provide relevant bargaining information. In an 11 September 1981 letter to the Union, the Respondent explained its objection to the unit and stated, "[w]e therefore decline to recognize your union as a bargaining agent, or to enter into labor negotiations with you." At the same time, the Respondent sent a letter to its employees notifying them that it was refusing to recognize the Union until the certification question was ultimately resolved and stating that it planned "to maintain our position on the issue through legal processes and will, if necessary, submit the issue to the federal court of appeals for a final determination."

In a Decision and Order issued 13 April 1982, the Board found that the Respondent had violated Section 8(a)(5) and (1) of the Act by refusing to bargain and furnish information to the Union. *Lauren Mfg. Co.*, 261 NLRB 140 (1982). When the Respondent refused to comply with the Board's Order, the Board filed an application for enforcement in the United States Court of Appeals for the Sixth Circuit. On 22 July 1983 the Sixth Circuit issued a decision affirming the Board's unit determination and enforcing the Board's Order in full. *NLRB v. Lauren Mfg. Co.*, 712 F.2d 245 (6th Cir. 1983). The Respondent refused to bargain and adhered to the position set forth in its 11 September 1981 letters until the date of the Sixth Circuit's decision.

The Respondent has provided health insurance coverage to all employees in the bargaining unit for a number of years. On 6 January 1983,[1] while the certification challenge was pending before the Sixth Circuit, the Respondent sent a letter to employees announcing that it was changing the terms of the existing health insurance coverage. In the letter, the Respondent informed employees that it was switching to a new cost sharing insurance plan, that the plan emphasized outpatient care, that employees who incurred large medical bills would receive less benefits under the new plan, and that the employees' deductible would be increased $150. The Respondent did not notify the Union directly about this intended change. On 25 January an employee informed a union field representative that the Respondent was instituting changes in health insurance coverage on 27 January. The Respondent put the announced changes into effect on 27 January.

In a 22 February letter to the Respondent, the union field representative requested bargaining over insurance coverage. The Respondent did not reply to this letter. In March the union representative spoke with the Respondent's president and requested bargaining over the insurance coverage changes. The Respondent's president replied that the union representative's letter had been sent to the Respondent's counsel. The parties stipulated that they have not had any other conversations regarding the alteration of insurance coverage and that the Respondent's decision to change insurance coverage was motivated solely by economic considerations.

C. *Contentions of the Parties*

The General Counsel contends that health insurance benefits are a mandatory subject of bargaining; that the Respondent had a duty to bargain with the Union at the time of the unilateral change notwithstanding the ongoing certification test; that the Respondent did not afford the Union a reasonable opportunity to bargain about the insurance benefit change before it unilaterally implemented the change; and therefore that the Respondent violated Section 8(a)(5) and (1) of the Act.

The Respondent contends that it did not violate the Act because the Union and employees knew about the intended change before it was implemented and nevertheless failed to request bargaining over it. The Respondent cites a number of Board cases that hold, generally, that a union loses its right to bargain over or complain about a unilateral change if the union has notice of the proposed change and does not timely request bargaining. E.g., *American Buslines*, 164 NLRB 1055, 1055–1056 (1967). The Respondent contends here that the Union had ample time to demand bargaining about the insurance change, and that the change was not announced as a fait accompli. Finally, the Respondent contends that the Board should adopt a new rule precluding institution of 8(a)(5) complaints during ongoing good-faith legal challenges to unit certifications.

D. *Discussion of Law and Conclusions*

It is settled that an employer violates Section 8(a)(5) and (1) of the Act by unilaterally changing terms and conditions of employment without first providing the collective-bargaining representative of its employees with a meaningful opportunity to bargain about the changes. *NLRB v. Katz*, 369 U.S. 736, 741–743, 747 (1962). It is also well settled that an employer has an obligation to bargain with a union which has been certified by the Board and that an employer is not excused from this bargaining obligation even though the employer is pursuing a good-faith postcertification challenge to the union's status. A refusal to bargain in these circumstances violates the Act. *Old King Cole, Inc. v. NLRB*, 260 F.2d 530, 531–532 (6th Cir. 1958); *Louisville Chair Co.*, 161 NLRB 358, 375–376 (1966), enfd. 385 F.2d 922, 928 (6th Cir. 1967), cert. denied 390 U.S. 1013 (1968). We decline the Respondent's invitation to overrule this longstanding precedent. Accordingly, since the Union was properly certified in 1981, the Respondent was under a duty to bargain with the Union in January 1983 when the Respondent altered the insurance plan.

We find that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing the terms of the employee medical insurance plan.[2] The Respondent admits that it changed the plan without bargaining with the Union, but contends that the notice of the change it gave to the Union provided the Union with a meaningful opportunity to bargain, that the Union then failed to request bargaining, and that it therefore acted lawfully.

Assuming arguendo that the Respondent's notice might have been sufficient where an employer had recognized its general bargaining obligation,[3] we

[1] Unless otherwise stated, all dates are 1983.

[2] Employee medical insurance is a mandatory subject of bargaining. See, e.g., *Rose Arbor Manor*, 242 NLRB 795, 798 fn. 6 (1979).

[3] But see *M. A. Harrison Mfg. Co.*, 253 NLRB 675, 676 (1980), enfd. 682 F.2d 580 (6th Cir. 1982) (3-day interval between announcement and institution of unilateral change not enough time for adequate opportunity to bargain; change unlawful). Member Hunter finds *M. A. Harrison* to be factually distinguishable from the instant case and therefore he finds it unnecessary to rely on that case in concluding that the Respondent here violated the Act.

reject the Respondent's contention that its notice provided the Union with a sufficient opportunity to bargain. In September 1981 the Respondent informed the Union and employees that it would not bargain with the Union until the certification issue was resolved by a court of appeals. It also rejected a request for bargaining information for the same reason. In January 1983 when the Union learned of the proposed change, the Respondent had for over 15 months consistently maintained its position and refused the Union's request to bargain. The certification litigation was still pending and the Respondent gave no indication that its previously announced position had changed in any respect. Given the Respondent's manifest refusal to bargain on any point in January 1983, the Union did not have a meaningful opportunity to bargain about the unilateral changes. In these circumstances, "the union could not be expected to make what promised to be a totally futile gesture—another demand for bargaining." *NLRB v. Union Carbide Caribe*, 423 F.2d 231, 235 (1st Cir. 1970). See *Sunnyland Refining Co.*, 250 NLRB 1180, 1181 fn. 3 (1980), enfd. 657 F.2d 1249 (5th Cir. 1981). Indeed, the Respondent completely ignored the February 1983 bargaining demand that the Union did make. Accordingly, the Respondent did not afford the Union a meaningful opportunity to bargain about the changes to the insurance plan before it unilaterally instituted them, the Union did not waive its right to bargain, and the Respondent violated Section 8(a)(5) and (1) of the Act. *NLRB v. Union Carbide Caribe*, 423 F.2d 231, 234–235 (1st Cir. 1970); *Peat Mfg. Co.*, 261 NLRB 240, 240 fn. 2, 242 (1982).

CONCLUSIONS OF LAW

1. The Respondent, Lauren Manufacturing Company, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO-CLC, Local No. 1091 is a labor organization within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees, including regular part-time employees, line operators and quality control inspectors employed by the Respondent at its facility located at 2228 Reiser Avenue, S.E., New Philadelphia, Ohio, but excluding the scheduler, all office clerical employees, and professional employees, guards and supervisors as defined in the Act constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

4. The Union is now, and at all times material herein has been, the exclusive representative for the purposes of collective bargaining of the employees in the aforesaid unit within the meaning of Section 9(a) of the Act.

5. By unilaterally implementing changes in its employee medical insurance plan on 27 January 1983 without giving the Union the opportunity to bargain about such changes, the Respondent has engaged in an unfair labor practice within the meaning of Section 8(a)(5) and (1) of the Act.

6. The aforesaid unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in an unfair labor practice, we shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. We shall order the Respondent to make whole all its unit employees for losses or expenses they suffered as a result of the Respondent's unilateral change, as prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), plus interest as computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

ORDER

The National Labor Relations Board orders that the Respondent, Lauren Manufacturing Company, New Philadelphia, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with the Union by unilaterally implementing changes in its employee medical insurance plan without affording the Union an opportunity to bargain over such changes.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain collectively in good faith with the Union as the employees' exclusive collective-bargaining representative with respect to employee medical insurance coverage and any changes in the coverage.

(b) Revoke any unilateral changes made to the employee medical insurance plan on 27 January 1983 and restore employee medical insurance coverage as it existed before the unilateral change, until such time as the Respondent negotiates with the Union in good faith until agreement or an impasse in negotiations is reached.

(c) Apply the restored insurance coverage to all employee medical insurance claims that originated

after the unilateral change, and make whole all employees who suffered monetary losses as a result of the Respondent's unilateral change, with interest as provided in "The Remedy."

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of payments due under the terms of this Order.

(e) Post at its New Philadelphia, Ohio place of business copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[4] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to bargain collectively with the Union, United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO-CLC, Local No. 1091, as the representative of our employees in the following appropriate bargaining unit, by unilaterally implementing changes in employee medical insurance coverage without affording the Union an opportunity to bargain over such changes:

All production and maintenance employees, including regular part-time employees, line operators and quality control inspectors employed by the Employer at its facility located at 2228 Reiser Avenue, S.E., New Philadelphia, Ohio, but excluding the scheduler, all office clerical employees, and professional employees, guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union with respect to employee medical insurance coverage and any changes in the coverage.

WE WILL revoke any unilateral changes made to the employee medical insurance plan on 27 January 1983 and restore employee medical insurance coverage as it existed before the unilateral change, until such time as we negotiate with the Union in good faith until agreement or an impasse is reached.

WE WILL apply the restored insurance coverage to all employee medical insurance claims that originated after the unilateral change.

WE WILL make whole all unit employees who suffered monetary losses as a result of the unilateral change.

LAUREN MANUFACTURING COMPANY